It's a Security, at Least When It Comes to Claim Priority

In re Linn Energy L.L.C., 936 F.3d 334 (5 Cir. 2019).

According to the 5th Circuit, if it looks like a security, walks like a security and quacks like a security, it is a security — at least when it comes to claim priority. Under Section 510(b) of the Bankruptcy Code, any claim that arises from the "purchase or sale of a security of the debtor or an affiliate of the debtor" is automatically subordinated. The question in *Linn Energy* was whether promised payments that were not technically "dividends," but whose value and frequency were linked to dividends of the debtors, could be treated as "securities" for purposes of subordination under Section 510(b). The court, seeking to uphold the central policy underlying Section 510(b) (*i.e.*, "that creditors are entitled to be paid ahead of shareholders in the distribution of assets," *id.* at 340), held that such claims should be subordinated as being equivalent to equity interests in the debtor. *Id.* at 344-45.

In *Linn*, the representative of the estate of Peter Bennet (the Estate) sought payment of nearly $10 million in unpaid "deemed dividends." In 1930, Bennet's wealthy uncle died and the uncle's will created a trust of which Bennet was a beneficiary. Bennet belonged to two classes within the trust — one of which was to receive 37.5% of income earned from Bennet's uncle's shares in Berry Holding Company (BHC) (the Income Beneficiaries); and one of which was to receive 25% of the income earned from the shares and, upon the youngest mem-

ber turning 21, was to receive the corpus of the trust (the Principal Beneficiaries). Despite transfer of the corpus, distributions to the Income Beneficiaries would continue until their deaths. In 1949, the youngest Principal Beneficiary turned 21. As a result, Bennet became the owner of his portion of the shares as a Principal Beneficiary and was entitled to his additional 37.5% of the income as an Income Beneficiary.

BHC subsequently underwent two transitions. First, in 1986, BHC underwent a merger and became Berry Petroleum Company (BPC). As part of that merger and a related dispute with a third party, some of the shares were retired, which hampered the Income Beneficiaries. As such, the arrangement in the trust was altered such that, instead of receiving 37.5% of the dividends issued on the shares, the Income Beneficiaries would receive "deemed dividends" that were payments equal to whatever amounts the payments would have been had the shares not been retired. In other words, the amount of the deemed dividends was tethered to the value of the BPC dividends, but were not technically dividends.

Second, in 2013, BPC entered into a share-for-share exchange with Linn Energy, and BPC became Berry Petroleum Company, L.L.C. In the exchange, Linn agreed to continue to pay the deemed dividends to the Income Beneficiaries. (At this point, Bennet was the sole survivor.) Those payments never occurred.

As fate would have it, Linn and Berry both filed for bankruptcy in 2016, shortly after Bennet's death, and the Estate filed a claim for the missed payments. The debtors argued that the deemed dividends were subordinated under Section 510(b) as being securities. The Estate argued that the deemed dividends were not securities because Bennet could not transfer his interest in the payments, he did not have any voting or shareholder rights and he had no right to demand a dividend payment. In its analysis, the court posed three questions: 1) Is it a claim for "damages"?; 2) Does the claim involve "securities of the debtor"?; and 3) Does the claim arise from a "purchase or sale" having a nexus with those securities? *Id.* at 341. Neither side challenged that the claim was for damages.

As to the second question, the court stated that interests would be deemed "securities if they bear hallmarks of interests commonly known as securities." *Id.* at 342 (internal quotes omitted). The court emphasized the difference between shareholders (who have potentially limitless benefits from the company's success, but bear the risk of subordination in the event of failure) and creditors (who have a limited benefit in terms of a set repayment amount, but are paid ahead of shareholders in the event of failure). The court held that, ultimately, Bennet had the same benefit expectations as a shareholder in that his payments, being directly tied to the companies' dividends, were dependent on the success of the company and were potentially limitless. As such, the Estate should be made to bear the same risk as a shareholder and be subordinated.

As far as whether the claim arose from the purchase or sale of a security, the court stated that the claim need only undergo a "but for" analysis. Would the claim exist but for a purchase or sale of securities? *Id.* at 344. The court pointed to both the 1986 merger and the 2013 exchange and stated that but for either of those transactions (both of which qualify as a purchase or sale), the Estate's claim would not exist. *Id.* Having satisfied all three elements, the Estate's claim was subordinated under Section 510(b) as arising out of the purchase or sale of securities of the debtors despite that it was not technically a security.

—**Cherie D. Nobles**
and
Michael E. Landis
Members, LSBA Bankruptcy Law Section
Heller, Draper, Patrick, Horn & Manthey, L.L.C.
Ste. 2500, 650 Poydras St.
New Orleans, LA 70130

Lightning Strikes Twice in 5th Circuit, Creating Split with the 4th

In a pair of cases released on the same day, the Louisiana 5th Circuit Court of Appeal grappled with the tension between the competing interests of adequate discovery and disposition of a case by summary judgment.

Both cases involved personal injury claims based on theories of merchant or premises liability. Plaintiffs in both cases appealed summary judgment in favor of the respective defendants, arguing that summary judgment was premature because it denied them the "opportunity for adequate discovery" required under La. C.C.P. art. 966(3). The 5th Circuit affirmed both judgments, one unanimously and the other with one dissent.

In *Hill v. Hobby Lobby Stores, Inc.*, 19-0089 (La. App. 5 Cir. 10/2/19), ____ So.3d ____, 2019 WL 4855045, Hill sued Hobby Lobby for premises and/or object defect for injuries sustained after a chair displayed in the store collapsed when she tried to sit in it. Hobby Lobby moved for summary judgment on grounds that she had failed to present positive evidence of essential elements of her claim. At the hearing on the motion, Hill argued that she had inadequate time for discovery and requested additional time to depose Hobby Lobby employees.

Judges Chaisson, Windhorst and Liljeberg presided over Hill's appeal. The court stated that motions for summary judgment may be made at any time, and it is within the judge's discretion either to render summary judgment or to allow further discovery. Further, while a party must be given an opportunity for "adequate discovery," there is no absolute right to delay action on a motion for summary judgment until discovery is complete. Parties need only a "fair opportunity" to present their claims, the court reiterated, and a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of material fact, unless the plaintiff can show probable injustice arising from the dismissal.

The court observed that Hill's accident occurred June 1, 2015, one year to the day before she filed suit on June 1, 2016. Hill propounded discovery requests to Hobby Lobby on Oct. 12, 2016. Hobby Lobby responded on April 11, 2018, but Hill did nothing in the interim to compel responses. Further, Hobby Lobby supplemented its responses on June 5 and June 15, 2018.

Hobby Lobby filed its motion for summary judgment on April 17, 2018, and the hearing on the motion was set for June 13. The hearing was continued to Sept. 26, at Hill's request, for the very purpose of allowing Hill time to conduct further discovery. The record is void of any actions taken by Hill between the June 13, 2018, continuance and the Sept. 26, 2018, hearing. While Hill argued that Hobby Lobby's delinquency in responding to discovery supported her position, the court emphasized the fact that Hill did not file a motion to compel in the 18 months it took Hobby Lobby to answer. Finally, Hill never actually filed for a continuance of the summary judgment hearing, instead requesting additional time for discovery at the hearing itself. All of these facts considered, the panel unanimously decided there was adequate opportunity for discovery and the trial court committed no error in proceeding with the summary judgment hearing.

In *Milton-Gustain v. Salvage Store, Inc.*, 19-0042 (La. App. 5 Cir. 10/2/19), ____ So.3d ____, 2019 WL 4855045, the Gustains sued the Salvage Store for premises liability after Mrs. Gustain slipped on an unidentified oily substance on the store's floor. In contrast to *Hobby Lobby*, the plaintiffs argued that summary judgment was premature because of specifically identified pending discovery.

The Gustains had previously attempted to secure the believed key witness' deposition testimony before the hearing on the motion for summary judgment, but she did not appear for the deposition. In lieu of the forthcoming deposition testimony, the plaintiffs admitted, they had no positive evidence for their claim, but they speculated that her testimony would raise a genuine issue of material fact.

The Gustains did not file a request to continue the hearing; rather, they argued at the hearing that they should be able to conduct the deposition before proceeding. The defendant refused to acquiesce in a continuance until after the deposition on the basis that five employees had already been deposed, none of whom provided any positive evidence as to plaintiffs' claims. Moreover, it was uncertain that the witness would even attend the rescheduled deposition.

The trial court proceeded with the hearing, and the Salvage Store prevailed on summary judgment. Plaintiffs appealed, arguing that proceeding on summary judgment before the final deposition could be conducted denied them

adequate discovery.

Judges Gravois and Molaison issued the opinion that restated the law as in *Hobby Lobby*, adding that the mere contention that one lacks sufficient information to defend against summary judgment, and therefore requires further discovery, is insufficient to defeat summary judgment. The court observed that the plaintiffs knew the name and address of the former employee from discovery provided to them in December 2017 but did not ultimately serve her with a notice of deposition until July 22, 2018, and further took no action to continue the summary judgment hearing. Moreover, the witness' presence was not even guaranteed at the later deposition since the motion to compel was deficient. Considering these facts, the court determined that the Gustains received a fair opportunity for discovery and it was, therefore, proper to proceed on the summary judgment hearing.

Judge Wicker, the third panel member, strongly dissented, arguing that the passage of time did not necessarily indicate a fair opportunity for discovery, instead citing the four-factor test given in *Roadrunner Transportation System v. Brown*, 17-0040 (La. App. 4 Cir. 5/10/17), 219 So. 3d 1265, 1272-73:

1) whether the party was ready to go to trial;

2) whether the party indicated what additional discovery was needed;

3) whether the party took any steps to conduct additional discovery during the period between the filing of the motion and the hearing on it; and

4) whether the discovery issue was raised in the trial court before the entry of the summary judgment.

Judge Wicker stated that plaintiffs' predicament was precisely the situation contemplated by *Roadrunner* — where the Gustains believed that the final witness was *the* crucial witness for their case, had specifically identified her as the remaining discovery to be conducted and had made significant efforts to obtain her deposition prior to the filing of the motion for summary judgment. Under these facts, proceeding in summary judgment was premature, as adequate discovery had not been allowed, and injustice would result therefrom. Furthermore, where the witness' failure to show up for the prior deposition date was out of plaintiffs' control, the plaintiffs had demonstrated good cause for which a continuance should have been granted under La. C.C.P. art. 996.

Ultimately, time is not the key in the 4th Circuit but, based on these decisions, the passage of time will be given weight in the 5th Circuit. These three cases give rise to differing results in the circuits, making the issue ripe for legislative clarification of "adequate discovery" or Supreme Court interpretation.

—**Shayna Beevers Morvant**
Secretary, LSBA Civil Law
& Litigation Section
Beevers & Beevers, L.L.P.
210 Huey P. Long Ave.
Gretna, LA 70053
and
Ashton M. Robinson
3L Tulane Law School and
Law Clerk
Beevers & Beevers, L.L.P.
210 Huey P. Long Ave.
Gretna, LA 70053

Louisiana Regional Haze

Sierra Club v. U.S. EPA, 939 F.3d 649 (5 Cir. 2019).

The 5th Circuit recently heard competing challenges — from both environmental groups and from industry — to the EPA's approval of Louisiana's plan to control regional haze. In its lengthy opinion, which conceded that Louisiana had failed to correctly and thoroughly vet its plan, the 5th Circuit nonetheless determined that EPA was within its power to approve the inadequate plan.

Two energy companies, Entergy Louisiana, L.L.C., and Cleco Power, L.L.C., argued that the Louisiana regional haze plan overestimated the pollution their plants produced by using a faulty model to measure emissions. The 5th Circuit cited the "significant deference" to agency decisions, deferred to EPA's choice of an emissions model and refused to consider that the data generated by the model was wrong. Interestingly, the EPA had agreed "in part" with the energy companies' contention that the model "uses oversimplified and unrealistic assumptions." *Id.* at 686. However, because the EPA decided to use the perhaps oversimplified and unrealistic model based on policy decisions that apply nationwide, the court deferred to EPA's decision to apply the model here, even where other models would have been more accurate.

At the same time, Sierra Club and National Parks Association argued that Louisiana was supposed to weigh five mandatory factors when determining the Best Available Retrofit Technology (BART) to control emissions at an Entergy power plant. The 5th Circuit agreed that Louisiana skipped multiple parts of the mandatory statutory factors. In fact, the 5th Circuit noted that the EPA told Louisiana that its plan was based on erroneous data, but it was nonetheless still fine for the EPA to defer to Louisiana's decision. The Louisiana DEQ did not expressly address all five required factors in its written plan, and instead simply stated that it "reviewed and weighed the five factors carefully." The 5th Circuit determined this was sufficient to support the EPA's approval of the state plan: "Although the LDEQ could have offered a more thorough explanation of its reasoning, . . . [t]he EPA's approval of that determination was not arbitrary or capricious." *Id.* at 673.

Clean Water Act

Ctr. for Biological Diversity v. U.S. EPA, 937 F.3d 533 (2019).

The 5th Circuit dramatically increased the burden on plaintiffs in Clean Water Act (CWA) citizens' suits to prove standing in this CWA decision.

Various environmental groups filed a CWA suit against the EPA after that agency approved a "General Permit" covering multiple oil and gas operations that discharge to federal waters in the Gulf of Mexico, attacking the permit on multiple grounds.

The 5th Circuit addressed standing first and noted that "[i]n environmental cases, courts must carefully distinguish between injury to the petitioner and injury to the environment. Article III standing requires injury to the petitioner. Injury to the environment is insufficient." *Id.* at 537. The court agreed that "[s]ometimes an individual's aesthetic, recreational, and scientific interests provide that link," so long as those interests are actually harmed or are in imminent dan-

Deadlines Approaching for Earning, Reporting CLE Credits

The deadlines are quickly approaching for earning and reporting continuing legal education credits for the year. Preliminary transcripts were mailed to the membership on Nov. 27.

Remember that all hours must be **earned** by Dec. 31, 2019, and must be **reported** no later than Jan. 31, 2020, or late penalties will apply.

The annual requirement for attorneys is 12.5 hours, including 1 hour of ethics and 1 hour of professionalism credit.

Attorneys admitted in 2018 are also required to earn a total of 12.5 hours but must have 8 hours of ethics, professionalism or law office management credits included within that total. Hours earned in the calendar years 2018 and 2019 are counted together for this initial compliance period.

In-house counsel admitted to practice under LASC 12, Section 14, must earn 12.5 hours annually, including 1 hour of ethics and 1 hour of professionalism, and must follow the same reporting requirements as all other attorneys. They do not qualify for the MCLE exemption.

The form for attorneys who do qualify for an MCLE exemption will be available online on Dec. 1. Attorneys may mail or email the exemption form to the MCLE Department, and it is recommended that attorneys keep a copy of any documentation related to that exemption on file. Attorneys who were impacted by this past year's severe weather events will again have the option to claim a disaster exemption. Exemption forms must be reported by Jan. 31, 2020.

Information regarding attorney requirements and pre-approved courses can be found on the website at: *www.lsba.org/MCLE*. Click "MCLE" on the header for information on the calendar, rules, forms and transcript information. Access a "how-to" flyer on transcripts: *www.lsba.org/documents/Members/MCLETranscriptHowTo.pdf*.

Louisiana State Bar Association
Serving the Public. Serving the Profession.

Mandatory Continuing Legal Education

ger of being harmed. *Id.*

The court looked for a "geographic nexus" between the challenged discharges into the Gulf and the plaintiffs' individual interests in the waters of the Gulf. Three of the four plaintiffs planned on snorkeling, viewing and photographing the Gulf waters from the shore; this was deemed an insufficient nexus to the deeper discharge area out in the Gulf.

The fourth plaintiff was different in that he spent a significant amount of time in boats and planes monitoring the offshore oil and gas industry and searching for oil spills. While this established a geographic nexus, the court found there was insufficient evidence of a "temporal nexus" between the complained-of discharges and this plaintiff's presence: "No evidence suggests [plaintiff's] boat trips and flyovers will coincide with the timing of discharges." *Id.* at 540.

In addition, the fourth plaintiff could not show any adverse effect: "Someone who goes looking for pollution cannot claim an aesthetic injury in fact from seeing it. . . . [C]rucial to an aesthetic injury is that the aesthetic experience was actually offensive to the plaintiff." *Id.* The court considered this plaintiff's monitoring of the Gulf to constitute a possible self-inflicted injury.

The court concluded at this point that all plaintiffs had failed to prove they had standing to sue. The court went on in dicta to note that plaintiffs also failed to meet the traceability requirement for standing. The court did not believe that plaintiffs could trace a discharge allowed under the general permit to the plaintiffs' specific injury from diminished use of the Gulf waters. The Gulf was simply too big and too complex to allow the court to infer "that a discharge in one place will necessarily affect a plaintiff's interest in another place." *Id.* at 545.

Compliance Dates for BAT and PSES

Clean Water Action v. U.S. EPA, 936 F.3d 308 (Aug. 28, 2019).

In this consolidated multidistrict litigation (MDL), various environmental groups petitioned for review of the EPA's final order that revised the earliest compliance dates for new BAT ("best available technology economically achievable") effluent limitations and PSES ("pretreatment standards for existing source") concerning waste streams from steam electric-power generating-point sources.

The complained-of compliance dates pertained to a 2015 rule that represented the culmination of 10 years' work by the EPA to update steam electric-power generating-plant standards for compliance with the Clean Water Act. In the 2015 rule, the agency defined much more stringent BAT limits and pretreatment standards for seven defined waste-streams.

Knowing it would take a substantial amount of time for companies to plan, fund and build compliant new facilities, the agency allowed plants to defer compliance with the rules anytime from 2018 through 2023. Four separate lawsuits challenging this decision were filed and consolidated as an MDL. The EPA in response then reconsidered the 2015 rule with regard to two of the affected waste streams (FGD wastewater and bottom ash transport water) and issued the "Postponement Rule" pertaining to these streams.

The 5th Circuit determined that the EPA's 2015 rule and the subsequent postponement rule were well justified by the agency. First, it noted that the postponement rule was a properly noticed rulemaking, which was an appropriate way to modify the 2015 rule. Second, it addressed plaintiffs' argument that the EPA violated the APA by focusing on only two out of the seven original waste streams and concluded that this decision also was well supported by the EPA. Finally, the EPA's decision to grant a longer-than-three-year compliance rule was not arbitrary or capricious, given the circumstances surrounding the costs and difficulty expected in reaching compliance with these new standards.

—Lauren E. Godshall
Member, LSBA Environmental Law Section
Tulane Environmental Law Clinic
6329 Freret St.
New Orleans, LA 70118

Final Spousal Support

Bloxom v. Bloxom, 52,728 (La. App. 2 Cir. 8/14/19), ____ So.3d ____, 2019 WL 3808020.

Ms. Bloxom obtained a protective order against abuse by Mr. Bloxom, and, subsequently, a divorce based on his domestic abuse of her and an award of final spousal support. The appellate court found that the award of support was appropriately set on the available evidence, including the uncertainty of Mr. Bloxom's actual income. There was no error in not fixing a time limit on the duration of the award, although it could be modified or terminated upon an appropriate change of circumstances. Subsequent amendments to the relevant articles, La. Civ.C. art. 103(4), 103(5) and 112, which were enacted after the filing of the petition and the signing of the judgment, were not retroactively applicable.

Custody

Calhoun v. Calhoun, 52,915 (La. App. 2 Cir. 8/14/19), 2019 WL 3807034.

After having drug and alcohol abuse issues and attending a rehabilitation program, Ms. Calhoun sought to modify the existing custody plan. The court of appeal noted her allegations that she had remained sober for more than two years, purchased a home near the child's school, regularly attended his activities and had the ability to provide for him through her employment, and stated:

> Although these alleged changes can be considered somewhat significant, given the prior events that have transpired, these cited circumstances also appear self-serving and superfluous, as these provide only negligible benefits to E.M.C.'s well-being. Thus, like the trial court, we cannot conclude that the circumstances cited by Jennifer actually rise to the level of material changes within the meaning of the law.

The appellate court agreed with the trial court's assessment that there was still the potential for relapse and that she needed to "prove herself" further. The appellate court also affirmed the trial court's decreasing her time with the child to end her physical custodial periods earlier because of the father's allegations that the child's school work was being affected. The appellate court also affirmed the trial court's fixing of the child support she was to pay, finding that the fact that there had not been a change of circumstances for custody did not also mean that there had not been a change of circumstances regarding child support; and that child support was not dependent on the amount of time that a parent spent with the child.

Guidry v. Guidry, 18-0639 (La. App. 5 Cir. 5/22/19), 274 So.3d 709.

The appellate court affirmed the trial court's award of joint custody, designating the father as domiciliary parent and requiring the mother's custody periods to be supervised. The mother had had drug abuse issues, and, although she had received treatment, the trial court had previously ordered that she be drug tested and have negative results for six months. She had only been tested for three months, only the last of which was negative. The appellate court found that under these circumstances her visitation should be supervised, pending later review upon her showing continuing rehabilitation over a period of time. There was testimony from the assistant principal at the child's school as well as the Dean of Students that the child performed better under the father's care than under the mother's.

Protective Order

Pellerano v. Pellerano, 17-0302 (La. App. 1 Cir. 4/12/19), 275 So.3d 947, *writ denied*, 19-0756 (La. 9/17/19), ____ So.3d ____, 2019 WL 4881855.

The ex-husband's standing behind the ex-wife's car and not allowing her to back out and leave after a custodial transfer of the parties' children was sufficient to constitute false imprisonment, thereby supporting the issuance of an order for petition for protection from abuse against the ex-husband. There had also been physical and verbal abuse both during and after the parties' marriage.

Community Property

Burtner v. Burtner, 19-0175 (La. App. 1 Cir. 10/1/19), 2019 WL 4855334 (unpublished).

Following Mr. Burtner's petition for divorce, Ms. Burtner filed a petition to have the parties' pre-marital separate-property-regime contract declared invalid due to alleged fraud, duress and misrepresentation. She alleged that she did not see the contract until three days before the scheduled wedding and that he told her that if she did not sign it, she and her minor child would have to move out of his home. She also claimed that she was under duress because she had a custody battle going on with the father of her child. She also claimed that she was not allowed time to obtain counsel to review the agreement. Both he and the attorney who drafted and notarized the contract testified that she was offered the opportunity to obtain independent counsel but declined. Mr. Burtner also testified that she had been given the contract over two weeks before the day it was signed. The appellate court affirmed the trial court's denial of her petition, finding that, based

on credibility decisions, the trial court did not err. Further, her argument that the trial court erred in allowing a copy of the contract to be introduced was rejected, since she had the burden to provide evidence to invalidate the contract; and, additionally, both parties had offered copies of the contract into evidence, and a copy had been attached to her petition. Notably, the court specifically held that her claim that his telling her he would not marry her unless she signed the contract created duress was rejected because that position — the threat of doing a lawful act or of exercising a lawful right — "does not rise to the level of duress-inducing threats sufficient to vitiate her consent."

Child Support

Pittman v. Flanagan, 19-0038 (La. App. 1 Cir. 9/27/19), ____ So.3d ____, 2019 WL 4729515.

The trial court did not err or deprive Flanagan of due process by limiting the amount of time each party could present his or her child-support claim at trial. The appellate court reviewed five factors for determining whether a party has been denied due process rights regarding time limitations for presenting a case and found that there had been no denial of rights under these circumstances. Further, it did not err in refusing to allow Flanagan's financial expert to testify at the trial because the expert was not timely disclosed; nor did it err in refusing to allow his testimony to be proffered, particularly since he was not timely disclosed. The dissent argued that the trial court's time limits were not reasonable, and, therefore, Flanagan was denied a fair opportunity to present his evidence; the dissenting judge would have remanded the matter to allow him additional time to present his case.

—David M. Prados
Member, LSBA Family Law Section
Lowe, Stein, Hoffman, Allweiss
& Hauver, L.L.P.
Ste. 3600, 701 Poydras St.
New Orleans, LA 70139-7735

Court of International Trade

Trendium Pool Prods., Inc. v. United States, Case 1:19-cv-00113 (Ct. Intl. Trade Aug. 20, 2019).

Trendium Pool Products filed suit against the Department of Commerce at the Court of International Trade challenging a scope ruling regarding imported pool kits and pool walls. Trendium imports the finished pool products from Canada into the United States. The products are partially made from corrosion-resistant steel imported into Canada from Italy and China. Corrosion-resistant steel products are subject to an antidumping order upon entry into the United States. In order to produce the finished pool products, Trendium first paints the imported steel from Italy and China. It next stamps or flattens the steel into individual corrugated pieces shaped as needed for a particular pool design. The pool kits are shipped ready for installation with no additional manufacturing necessary.

Trendium requested a scope ruling from Commerce, contending that its finished pool products should not be subject to the antidumping order because the steel products that are subject to the order are mere inputs that undergo substantial transformation into a new product through processing in Canada. Commerce denied Trendium's scope request based upon the Federal Circuit's decision in *Mid-Continent Nail Corp. v. U.S.*, 725 F.3d 1295 (Fed Cir. 2013). Commerce ruled that the pool products were mixed-media items (products that are merely a combination of subject and non-subject merchandise) subject to the Commerce presumption that they are within the scope of the antidumping order. The Court of International Trade reversed the Commerce Department's decision as unsupported by substantial evidence and contrary to law.

The court first ruled that the finished pool products are not subject to the plain scope language of the order. The order does not cover downstream products that

cannot be used as a raw input. The subject pool products were never part of the underlying investigation, and the record lacked any evidence that Commerce considered downstream products. The court further ruled that the finished pool products were never subject to an International Trade Commission injury analysis, and therefore the antidumping order is inapplicable by operation of law under 19 U.S.C. § 1673 (requirement that a U.S. industry must be materially injured prior to imposition of antidumping duties).

World Trade Organization

United States-Tariff Measures on Certain Goods from China, (DS 543) (U.S. First Written Submission Aug. 27, 2019).

The United States released its first written submission provided to a World Trade Organization (WTO) dispute-settlement panel in a case brought by China challenging U.S. tariffs imposed as a result of its March 2018 Section 301 Report on China's policies and practices relating to technology transfer, intellectual property and other unfair trade acts. The U.S. Section 301 tariffs are at the heart of the ongoing trade battles between the United States and China. China alleges that the U.S. tariffs violate the WTO foundational Most Favored Nation principle (Article I) by imposing tariffs above the bound rate contained in the U.S. schedule of concessions (Article II).

The United States' first written submission contends that China's request for Dispute Settlement Body findings violates nine separate core principles of the WTO. The United States contends that China's request violates, *inter alia*, DSU Article 12.7 (China and the United States have taken sovereign actions in their own interest and, therefore, they have both recognized that the matter does not involve WTO obligations); DSU Article 3.2 (China's unfair trade practices are not covered by existing WTO "rights and obligations" under covered agreements and, therefore, the DSU has no role); DSU Article 3.3 (China's retaliatory measures taken in response to U.S. Section 301 tariffs negates the "prompt settlement of disputes" principle of the DSU; DSU Article 3.4 (DSB findings in this case would not help resolve the underlying dispute because the issues are not covered by existing WTO agreements); and DSU Article 3.2 (DSB findings in this dispute would not add to WTO "security and predictability" because China's unfair trade actions are not subject to WTO rules and China has already taken countermeasures that would result from a favorable DSB ruling).

—Edward T. Hayes
Chair, LSBA International Law Section
Leake & Andersson, L.L.P.
Ste. 1700, 1100 Poydras St.
New Orleans, LA 70163

5th Circuit Holds that Class Arbitrability is Gateway Issue for Court to Decide

The U.S. 5th Circuit Court of Appeals held that, absent clear and unmistakable language to the contrary, class arbitrability is a gateway issue for courts, not arbitrators, to decide. *See 20/20 Communc'ns, Inc. v. Crawford*, 930 F.3d 715, 717 (5 Cir. 2019).

In *20/20 Communications*, 18 field-sales managers individually filed for arbitration of their claims against their employer, 20/20 Communications, for failure to pay overtime compensation in violation of the Fair Labor Standards Act. *Id.* As a condition of their employment with 20/20 Communications, the field-sales managers had signed a mutual arbitration agreement that permitted arbitration on an individual basis but not on a class wide/collective action basis. *Id.*

After the field-sales managers filed an amended claim for arbitration clarifying that they wished to proceed collectively in all 18 actions, 20/20 Communications

sought, *inter alia*, a declaration from the district court that the issue of class arbitrability was for the court, not the arbitrator, to decide as per the arbitration agreement. *Id.* When the district court held otherwise, 20/20 Communications appealed. *Id.* at 718.

Noting that the Supreme Court had not decided whether class arbitrability was a gateway issue for the courts to decide, the 5th Circuit recognized that several of its "sister circuits" had already decided the issue and determined that class arbitrability was, in fact, a threshold issue for the courts to decide. *Id.* (citing *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 877 (4 Cir. 2016); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6 Cir. 2013); *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502, 506-07 (7 Cir. 2018); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8 Cir. 2017); *Eshagh v. Terminix Int'l Co., L.P.*, 588 F. App'x 703, 704 (9 Cir. 2014) (unpublished); *JPay, Inc. v. Kobel*, 904 F.3d 923, 935-36 (11 Cir. 2018)).

The 5th Circuit agreed with the reasoning of its sister circuits that class arbitrability was a gateway issue for the courts to decide because of the fundamental differences between class arbitrations and individual arbitrations, like size and complexity. *Id.* at 719. Moreover, the court reasoned, class arbitrations implicate certain due process concerns (*i.e.*, receipt of notice, opportunity to be heard and right to opt-out) that raise the cost and reduce the efficiency of arbitration. *Id.* Finally, the court concluded that it was illogical for the parties to prohibit class arbitration in their agreement yet allow the arbitrator the authority to decide whether class arbitration was available. *Id.* at 720. Because the language in the agreement did not clearly and unmistakably overcome the legal presumption, the 5th Circuit held that class arbitrability was a threshold issue for the district court to decide in the matter. *Id.*

—Alexander C. Landin
Member, LSBA Labor and Employment Law Section
The Kullman Firm, A.P.L.C.
Ste. 1600, 1100 Poydras St.
New Orleans, LA 70163-1600

Mineral Law

Well Costs Reporting Statute; Penal Statutes; Notice

B.A. Kelly Land Co., L.L.C. v. Aethon Energy Operating, L.L.C., ____ F.Supp.3d ____, (W.D. La. 2019), 2019 WL 5021267.

This case teaches a lesson about following the letter of the law with regard to notice requirements pursuant to penal statutes. B.A. Kelly Land Co., L.L.C., owns a tract of land in Bossier Parish that is within two compulsory drilling and production units — the Lower Cotton Valley Zone, Reservoir A, and the Haynesville Zone, Reservoir A. The land was subject to a mineral servitude, but the servitude terminated in 2013 when the servitude owner died. A mineral lease that had been granted by the servitude owner terminated when the servitude terminated, and Kelly then became an unleased owner.

Aethon became operator of the units in 2016. By then, 15 wells in the Lower Cotton Valley unit and one well in the Haynesville unit had reached payout. As an unleased owner, Kelly was entitled to its pro rata share of the wells' monthly revenues after payout, subject to a deduction of Kelly's share of ongoing operating costs. On Dec. 15, 2017, Kelly sent a certified letter to Aethon. The letter identified the units, stated that Kelly was an unleased owner and requested certain information about well costs and revenue.

On April 17, 2018, Kelly sent a second certified letter. This letter asserted that Aethon had not complied with Louisiana law because it failed to send a sworn detailed statement that provided the operating costs and expenses requested by the first letter. A representative of Aethon then contacted a representative of Kelly and ultimately provided certain summary reports, but these did not contain the level of detail that Kelly sought about revenue and expenses.

In September 2018, Kelly filed a lawsuit based on La. R.S. 30:103.1 and 103.2 (Well Cost Reporting Statute). Kelly alleged that Aethon's reports failed to include the information required under R.S. 30:103.1, and, pursuant to R.S. 30:103.2, the penalty for this failure was that Aethon forfeited its right to collect Kelly's pro rata share of the wells' operating costs. Kelly filed a motion for partial summary judgment that Aethon had forfeited its right to charge costs to Kelly.

The district court denied Kelly's motion. Under R.S. 30:103.1, a unit operator must send sworn detailed reports to an unleased owner who makes a request by certified mail. Under R.S. 30:103.2, if the operator fails to send such reports within 90 days after the completion of a well, and the operator also allows 30 additional days to elapse after receiving a certified letter providing notice that it has failed to send the required reports in response to the first letter, the operator forfeits its right to collect costs from the unleased owner.

However, because the statute is penal, it is strictly interpreted, and the forfeiture does not apply unless the unleased owner complies with the statute to the letter.

Here, the district court found that the December 2017 letter did not meet the requirements of R.S. 30:103.1 to request information and that the April 2018 letter did not meet the requirements of R.S. 30:103.2 to notify an operator of its failure to comply with a prior request for information. The court explained that one of the shortcomings of the letters was that they failed to reference R.S. 30:103.1 or R.S. 30:103.2. Further, when a proper request is made, R.S. 30:103.1 requires the operator to send initial reports and quarterly reports, but Kelly's letters did not specifically request initial and quarterly reports. The court concluded that the "formal notice" requirement of the statute was paramount given the statute's penal nature and that any ambiguity in the notice was to be construed against the party who sent the notice. Thus, because Kelly failed to follow the statutory requirements of the Well Costs Reporting Statute, its motion for partial summary judgment was denied. Indeed, the court stated that it planned to enter a sua sponte summary judgment in favor of Aethon.

Diversity Jurisdiction; Jurisdictional Amount; Attorney's Fees

Zip, L.L.C. v. Zachry Expl., L.L.C., ____ F.Supp.3d ____, (W.D. La. 2019), 2019 WL 5096092.

Zip, L.L.C., filed a lawsuit against Zachry Exploration, L.L.C., in state court, alleging that Zachry's operations damaged plaintiff's rice, crawfish and land. Zip demanded $73,000 in damages. Zachry removed the case to federal court on the basis of diversity jurisdiction. Zip filed a motion to remand, arguing that the case should not stay in federal court because it did not seek the requisite amount ($75,000) in damages to satisfy federal jurisdictional requirements. Zachry argued that that it did not matter that plaintiff only sought $73,000 ($2,000 shy of $75,000) because plaintiff's attorney's fees would likely exceed $2,000, thus meeting the jurisdictional threshold. The court agreed. Although the court did not have before it any specific information about Zip's counsel's rate or the hours expended, it was not a reach for the court to find that any combination of typical rates and anticipated hours could result in an attorney's fee award in excess of $2,000. Thus, the court found that Zachry met its burden regarding the amount in controversy and could stay in federal court.

—**Keith B. Hall**
Member, LSBA Mineral Law Section
Director, Mineral Law Institute
LSU Law Center
1 E. Campus Dr.
Baton Rouge, LA 70803-1000
and
Colleen C. Jarrott
Member, LSBA Mineral Law Section
Baker, Donelson, Bearman,
Caldwell & Berkowitz, P.C.
Ste. 3600, 201 St. Charles Ave.
New Orleans, LA 70170-3600

Discovery of Credentialing Records

Danos v. Minnard, 19-0268 (La. App. 5 Cir. 8/28/19), ____ So.3d ____, 2019 WL 4051706.

The trial court denied the plaintiffs' discovery request to a hospital for the "entire file" of each of the three physicians, determining that the documents were privileged pursuant to the peer-review statutes. The plaintiffs responded that, in addition to a medical malpractice claim, they had filed a separate negligent credentialing claim against the hospital, that a medical-review panel determined that the physicians had committed malpractice and that there was evidence that a hospital had "prior issues" with one of the physicians. The plaintiffs contended that the credentialing information did not fall under the purview of the peer-review privilege.

The defendants countered that the only exception to La. R.S. 13:3715.3 was when physicians' hospital privileges are suspended or revoked, whereupon the physicians can obtain a copy of their own credentialing file if they file a lawsuit against a hospital for reinstatement. This argument led the plaintiffs to inquire how, after the Louisiana Supreme Court ruled a cause of action existed outside the MMA for negligent credentialing, there was no way to obtain credentialing evidence.

After discussing the peer-review statute's discovery limitations and recent Supreme Court decisions, the 5th Circuit determined that the failure of the trial court to conduct "an *in camera* review of the discovery documentation at issue" before denying the plaintiffs' motion to compel was error, and such a review "is required for a proper determination . . . as to whether the privilege provided in La. R.S. 13:3715.3 is applicable to the discovery documentation at issue." The appellate court then instructed the hospital to produce the "entirety" of the records requested, under seal, for an *in camera* review and recommended how the trial court, thereafter, should proceed:

> Respondent WJMC shall produce to the trial court, *under seal*, for an *in camera* review, the documents requested by relators responsive to the discovery requests in their entirety, with proposed redactions of the analysis and conclusions of the peer review panel claimed by WJMC to be privileged. As to any purely factual information available to relators through other means of discovery, WJMC shall provide a statement indicating where and how such information is otherwise available to relators. After conducting an *in camera* review of the documentation provided, the trial court should render judgment either denying the motion to compel and clearly stating that the documents and information sought are protected by the statutory privilege under La. R.S. 13:3715.3 and contain no factual accountings or

documentation otherwise unavailable through ordinary discovery, or it should render judgment granting the motion to compel and clearly indicating which documents are to be produced, either in their entirety or with redactions, and providing all respondents with the opportunity to seek supervisory review of that determination prior to production of those documents to relators.

Discovery of DHH Records

Sawyers v. Naomi Heights Nursing Home & Rehab. Ctr., L.L.C., 19-0331 (La. App. 3 Cir. 8/21/19), ____ So.3d ____.

Disturbed by the care rendered by two nursing homes, and prior to the resident being moved to a third facility, the patient's family complained to the Louisiana Department of Health and Hospitals (DHH), which conducted unannounced investigations. DHH found both nursing homes' deficient practices in violation of federal and state regulations. The defendants filed a motion *in limine* to prevent use at trial of any DHH records about the patient or any complaint surveys conducted while she was a resident at the nursing homes. The motion was denied, and the defendants sought a supervisory writ.

The defendants acknowledged that Louisiana Code of Evidence art. 803(8)(a)(iii) allows factual findings from an investigation made pursuant to authority granted by law as an exception to the hearsay rule and, therefore, renders them admissible at trial. They argued, however, that Louisiana Code of Evidence art. 803(8)(b)(iv) excludes this exception when those factual findings result from an investigation of a particular case, *i.e.*, factual findings of general investigations are admissible; those of specific incidents are not.

The plaintiffs responded that all the information in the DHH reports is admissible pursuant to La. R.S. 13:3715.3, a statute they contend was specifically enacted for cases such as this one. The defendants countered that the plaintiffs' "reliance on La. R.S. 13:3715.3(G)(4)(e) [was] misplaced because that statute applies to peer review proceedings, rather than to medical malpractice claims;" the plaintiffs' rejoinder was that the same statute was enacted as an exception to the hearsay rule *for* the admissibility of such records if they are related to an injury suffered by a patient in a civil suit.

The 3rd Circuit decided that La. R.S. 13:3715.3(G)(4)(e) favored admissibility and that the exclusion of evidence under the Louisiana Code of Evidence "does not mean that that evidence cannot be expressly designated admissible under another statutory provision, such as La. R.S. 13:3715.3(G)(4)(e)."

—Robert J. David
Gainsburgh, Benjamin, David, Meunier & Warshauer, L.L.C.
Ste. 2800, 1100 Poydras St.
New Orleans, LA 70163-2800

Ad Valorem Tax Exemption Does Not Apply to Leased Property

Aaron's, Inc. v. Foster, 19-0443 (La. App. 4 Cir. 9/25/19), ____ So.3d ____, 2019 WL 4924307.

Aaron's, Inc. operates 50 stores in Louisiana, focusing primarily on the rent-to-own personal property business. Aaron's received two ad valorem tax bills from the City of New Orleans, which Aaron's paid under protest. Pursuant to Art. VII, Section 21 (C)(9) of the Louisiana Constitution, Aaron's claimed an exemption from the Orleans Parish ad valorem taxes because the personal property was being used in the homes of its customers. Aaron's and the tax assessor filed motions for summary judgment, contending each was entitled to judgment as a matter of law. The trial court granted the tax assessor's motion for summary judgment, finding that no exemption applied to Aaron's. Aaron's appealed the district court's ruling.

Art. VII, Section 21 (C)(9) of the Louisiana Constitution provides that "personal property used in the home or on loan in a public place" shall be exempt from ad valorem taxation. Aaron's contended that its personal property, leased out with its customers, constitutes personal property used in the home.

The court held, based on a plain reading of the language, that the constitutional provision intended that the owner of the personal property be the party using the item in the owner's home in order to qualify for the ad valorem tax exemption. The court held the provision was intended to exempt personal property being used in someone's home by the owner or personal property being used for the public good as opposed to personal property owned by a business being used in a customer's home. In addition, the court noted that if Art. VII, Section 21(C)(9) was intended to exempt Aaron's leased personal property, there would be no need for the Legislature to enact a state statute providing tax credits for ad valorem taxes paid (La. R.S. 47:6006). The exemption provided by Art. VII, Section 21(C)(9) was found to not explicitly apply to Aaron's leased personal property.

In addition, Aaron's contended that the trial court failed to apply La. R.S. 9:3362 to find that its personal property being leased was not subject to the constitutional exemption. Aaron's contended that the statutory provision required the lessee be considered the owner of the leased property, thus obviating the payment of ad valorem taxes. The tax assessor contended that the provision applied only to sales taxes. The court agreed with the tax assessor and held Aaron's failed to prove La. R.S. 9:3362 created an exemption from ad valorem taxes that would apply to Aaron's leased personal property. The court held the tax assessor was entitled to summary judgment and affirmed the district court's ruling.

—Antonio Charles Ferachi
Member, LSBA Taxation Section
Director, Litigation Division
Louisiana Department of Revenue
617 North Third St.
Baton Rouge, LA 70821

Continued next page

Federal Court Dismisses Constitutional Challenge over State Tax Penalties

Rock Creek Oil, Inc. v. La. Dep't of Revenue, No. 2:19-CV-00815 (W.D. La. Sept. 13, 2019), 2019 WL 4413260.

After an audit, the Louisiana Department of Revenue (LDR) determined that Rock Creek Oil, Inc. (RCO) had failed to properly report an oil-and-gas well on its severance-tax returns. Accordingly, the LDR issued proposed assessments for tax, interest and penalties. Ultimately, the LDR waived half of the penalties but issued Notices of Assessment for the remainder. RCO filed a civil rights complaint against the LDR in the United States District Court for the Western District of Louisiana.

The LDR moved for dismissal for lack of jurisdiction and failure to state a claim. Under the Tax Injunction Act (TIA), 28 U.S.C. § 1341, a district court may not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a sufficient remedy may be had in state court. The court held that under *Direct Marketing Ass'n v. Brohl*, 135 S.Ct. 1124, 1130-31 (2015), notice and reporting requirements were a form of "information-gathering" for purposes of establishing tax liability. The court further held that information-gathering as such was not equivalent to the assessment, levy or collection of a tax. The court, therefore, reasoned that a federal suit concerning information-gathering functions did not affect the scope of collection activities protected by the TIA. RCO's suit dealt with penalties related to reporting requirements, and so the court concluded that the TIA did not preclude federal jurisdiction over the case.

The Eighth Amendment prohibits fines that are grossly disproportional to the gravity of the defendant's offense. However, the court recognized that the state Legislature had the first say in defining appropriate penalties. RCO did not challenge the facial constitutionality of the penalty statute itself and did not claim that the LDR had exceeded its statutory authority. To the contrary, the court noted that the LDR had in fact already waived half the penalties that would have been due under the law. Consequently, the court held that RCO had failed to state a claim under the Eighth Amendment.

The court dismissed RCO's due process claims because RCO elected not to exercise its procedural rights in Louisiana tribunals. The court also dismissed RCO's estoppel claims. Finding no cause of action, the court dismissed the complaint. However, the court stated that the dismissal did not affect any remedies available to RCO under state law.

—Michael Nelson Bardwell
Clerk, Louisiana Board of Tax Appeals
627 North Fourth St.
Baton Rouge, LA 70821

Is House Flooding During a Natural Disaster a Redhibitory Defect?

In *Radlauer v. Curtis*, 19-0311 (La. App. 4 Cir. 2019), 2019 WL 3818794, the Louisiana 4th Circuit Court of Appeal reviewed whether a house flooding during a natural disaster created a redhibitory defect.

When Dr. Brint purchased the property in 1999, he signed a property disclosure statement stating the property sustained a "small amount of water seepage" in May 1995 (the 1999 property disclosure). In 2004, Mr. and Mrs. Radlauer (the purchasers) executed an agreement to purchase with Dr. Brint (the seller). Purchasers asked their agent prior to executing the act of sale whether the property ever flooded, and the agent stated the property had no history of flooding. The parties disagreed whether seller provided purchasers with the 1999 property disclosure. Seller, seller's real estate agent and purchasers' real estate agent testified that seller's agent provided the 1999 property disclosure to purchasers' agent, who then provided it to purchasers, but purchasers denied receiving it.

The Act of Sale was executed on Nov. 15, 2004, along with a property disclosure (the 2004 property disclosure) and an "As Is Clause" addendum, which included a waiver of redhibition. On the 2004 property disclosure, seller checked "no," indicating that no flooding had been experienced on the property. The property later flooded as a result of Hurricane Katrina.

Purchasers sued seller and purchasers' real estate agent for damages and redhibition. Seller filed a motion for summary judgment, which was granted on Jan. 2, 2019, and purchasers timely appealed. On appeal, purchasers' main assignment of error was the district court's finding that, because the property only flooded twice during major natural disasters, purchasers failed to show a redhibitory defect existed. The 4th Circuit reviewed whether the property's "propensity to flood or experience water seepage" is a redhibitory defect.

Purchasers argued that the May 1995 flooding disclosed in the 1999 property disclosure was not proven to be connected to the May 8, 1995, flood. However, the 4th Circuit found that a copy of the National Flood Insurance Program Property Loss History for the property sent by FEMA reflected a flood payment was made for property loss sustained on "05/08/1995" and "08/29/2005," and no other dates were listed.

Although susceptibility to flooding can be a redhibitory defect, the mere fact that a house has flooded under extraordinary rainfall is not a redhibitory defect. The record showed the property flooded only twice in a 10-year period, and each flood occurred during a natural disaster. Seller established the absence of facts that the property has a predisposition to flood under normal conditions, and purchasers failed to establish a genuine issue of material fact. Thus, the 4th Circuit held that the property did not have a redhibitory defect and affirmed the district court's judgment granting seller's motion for summary judgment.

—Amanda R. Lack
Member, LSBA Trusts, Estate, Probate and
Immovable Property Law Section
Sher Garner Cahill Richter Klein
& Hilbert, L.L.C.
Ste. 2700, 909 Poydras St.
New Orleans, LA 70112